Single Bench

IN THE HIGH COURT OF JUDICATURE OF C.G. AT BILASPUR

SECOND APPEAL NO. 250 /2006

APPELLANTS (1) Gambhirmal Jain, son of Ratan Lal, aged about 50 years, resident of village Kohka, Tahsil Dongergoan, District Rajnandgoan, Chhattisgarh.

(Defendent No.1)

(2) Bhuneshwar Prasad, son of Laxman Prasad, aged about 53 years, resident of village Kohka, Tahsil Dongergoan, District Rajnandgoan (C.G.)

(Defend. No. 2)

(3) Anil Kumar, son of Jethmal, aged 35 years, resident of village Kohka, Tahsil Dongergoan, District Rajnandgoan, Chhattisgarh.

(Defend. No. 5)

P.R. No. 1552 Dt. 16-6-06
Presented by Shri R.R. Yadav
dated 16.6.06

VERSUS

RESPONDENTS (1) Deonarayan Tiwari, son of Laxman Prasad Tiwari, aged about 62 years, resident of Lalbag Rajnandgoan, Distt. Rajnandgoan, Chhattisgarh.

(Plaintiff)

(2) Chandrika Prasad, son of Laxman Prasad aged about 65 years, resident of Kohka, Tahsil Dongergoan, District Rajnandgoan, Chhattisgarh.

(Defend. No. 3)

(2)

5 ~~(3)~~ Smt. Geeta Bai, Wife of Nathu Prasad Tiwari, aged about 60 years, resident of village Diwanbhedi, Tahsil Dongergoan, District Rajnandgoan, C.G.

(Defend. No. 4)

SECON CIVIL APPEAL UNDER SECTION 100 CIVIL PROCEDURE CODE

GD

HIGH COURT OF CHHATTISGARH AT BILASPUR

Second Appeal No. 250 of 2006

Gambhirmal Jain and others

Versus

Deonarayan Tiwari and others

Judgment be posted for 26-9-2006

Sd/-
Dhirendra Mishra
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

S.A. No. 250/2006

Appellants : Gambhirmal Jain and others.

Versus

Respondents : Deonarayan Tiwari and others.

Shri J.S. Baraik counsel for the appellants.
Shri R.N. Jha counsel for the respondents.

J U D G M E N T

(Delivered on 26-9-2006)

Dhirendra Mishra,J:

This is appellants/defendants' second appeal under section 100 of the Code of Civil Procedure as the suit filed by the plaintiff/respondent for declaration, possession and damages of the suit house has been decreed by the trial Court which has been confirmed by the impugned judgment and decree passed by the learned First Appellate Court in Civil Appeal No. 4-A/2005.

2. The brief facts of the case of the plaintiff before the trial Court was that the suit house is a joint Hindu Family Property and the partition has not taken place. As per the family arrangements the three brothers are residing in their respective shares after constructing houses over the same. The share of the plaintiff has been described in schedule-A. Defendant No.2 was looking after the house of the plaintiff since he is residing at Rajnandgaon where he is working as a teacher. Defendant No.2 without permission of the plaintiff and without informing him executed a transfer deed in a stamp paper and thereby transferred the house of his own share and also the share of the plaintiff including the kitchen garden on 10.5.1990 to the defendant No.1. It is further the case of the plaintiff that as per right of pre-emption he had the first right to purchase the share

of the other shareholders. Defendant No.1 was his tenant for a period from 1982 to 1988. He had served a notice dated 17.5.1990 to defendants No. 1 and 2 expressing his desire to purchase the share of defendant No.2 in case he intends to transfer the same. The defendant No.2 on the basis of illegal transfer initiated mutation proceedings before the Tehsildar, Dongargaon to which the plaintiff objected, however, no action was taken on his objection.

3. The defendant No.1 lease out the house of the plaintiff to one Anil Kumar – Defendant No.5 on a monthly rent of Rs. 60/- whereupon a notice was given on 14.8.1995. However, even after receipt of the notice they did not vacate his premises and during the pendency of the suit they obtained a certificate from the Tehsildar in respect of 2962 sq.ft. of land on the basis of sale deed dated 10.5.1990 and thus the suit for possession of the land described in schedule A of the plaint and damages was filed. The defendants No. 1, 2 and 5 in their written statements denied the averments of the plaint and submitted that during the lifetime of Laxman Prasad Tiwari the defendant No.3 has separated after taking his share. Partition was effected between the plaintiff and defendant No.2 after the death of Laxman Prasad Tiwari and defendant No.2 had reconstructed a house over his share in the year 1994 and defendant No.1 is in his possession over his share. He further stated that the defendant No.2 has proposed to the plaintiff to sell his entire share, however, the deal did not materialize as the plaintiff was not ready to pay sufficient consideration. Defendant No.2 had perfected his title on the ground that peaceful possession by way of adverse possession. Defendant No.1 purchased the well and the kitchen garden on 10.5.1990 and the plaintiff has no right to challenge the above sale deed. The plaintiff and defendant No.3 are possessed of separate kitchen garden and well and they are in possession of larger accommodation than that of defendant No.1. Properties described in schedules A and B never fell in the share of the plaintiff and the defendant No.3. Another objection was taken by the defendants in their written statements that in Civil Suit No. 73-A/91 the plaintiff had filed a counter claim which stands rejected and the subject

matter of that civil suit and the parties thereto and the subject matter of the present suit and the parties thereto are common and therefore, this suit is hit by the doctrine of res judicata. The suit has not been properly valued. The defendant No.1 obtained Patta of the Abadi land as per the Government rules and the plaintiff has no right to challenge the same without arraying the State as party and the suit is barred by law of limitation.

4. On the basis of the pleadings of the respective parties the issues were framed. Statements of the plaintiff and the defendants and their witnesses were recorded and thereafter the suit was decreed by the trial Court with the following findings:

A) That, the plaintiff and defendants 2 to 4 have ancestral house at village Kohka.

B) That defendant No.2 sold part of the plaintiff's house along with his own to the defendant No.1 on 10.5.1990 without his permission.

C) That, member of the family had the first right to purchase the ancestral property.

D) That, the defendant No.1 on 11.8.1990 took forcible possession of the house of the plaintiff by breaking open the lock.

E) That the suit is maintainable and it is not hit by the doctrine of res judicata.

F) Defendant No.1 lease out two rooms of the plaintiffs to defendant No.5 at a monthly rent of Rs. 300/-.

G) That the suit is within time and is not barred by law of limitation and the proper court fee has been affixed and with these findings the suit was decreed as under:

(i) The plaintiff is entitled to recover possession of the house described in schedule A and B from defendants 1 and 5.

(ii) Defendants 1 and 5 shall pay damages of Rs. 2,700/- and the plaintiff shall be entitled for the mesne profit at the rate of Rs. 150/- per month for two years.

(iii) The sale deed dated 10.5.1990 is not binding on the plaintiff and the *patta* of Ex. D-1 is not binding on the plaintiff to the extent of his share. Accordingly the suit was decreed with cost.

5. The appeal preferred by defendants No. 1, 2 and 5 has also been dismissed and the findings recorded by the trial Court have been confirmed by the impugned judgment and decree.

6. Learned counsel for the appellant submits that the findings recorded by both the Courts below are perverse and based on mis-appreciation of the evidence and material available on record. He submits that both the Courts below have ignored the fact that though the plaintiff has not been able to prove the title to the disputed property but even then the decree of possession over the suit property has been passed. Defendant No.1 was a bona fide purchaser of the property from the defendant No.2 and he purchased the same after paying the valuable consideration and as such he was entitled for protection under section 41 of the Transfer of Property Act and this aspect of the matter has been ignored by both the Courts below. It is argued that the Revenue authorities after due inquiry as per the government rules granted *Patta* of the Abadi land to the defendant No.1 vide Ex. D-1. However, the Courts below have passed the decree in favour of the plaintiff even in the absence of State as a party and in these circumstances it is contended that the following substantial questions of law arise for consideration in this appeal:

a) Whether the plaintiff allowed his brother the appellant to act as an ostensible owner of the suit property and hence the plaintiff is estopped to challenge the sale transaction which took place in between the defendant No.1 and 2 claiming to be the real owner?

(b) Whether the civil suit is barred u/s 257 of the Land Revenue Code regarding the *Patta* of the Abadi Land and granted to the defendant No.1?

(c) Whether the civil suit filed by the plaintiff is barred by time and the both lower courts below erred in applying the law of limitation Act?

7. I have heard learned counsel for the appellant and perused the material available on record.

8. As already stated in the foregoing paragraphs the learned trial Court after appreciating the evidence available on record and marshalling the same in detail have arrived at the conclusion that the unregistered sale deed dated 10.5.1990 executed by the defendant No.2 pertains to the portion of the plaintiff's share also apart from the share of the defendant No.2. The above finding is based not only on the evidence led by the plaintiff during trial but also on admission of the defendant Nos. 1 and 2 in their statements on oath.

9. So far as the submission of the counsel for the appellants that the defendant No.1 purchased the property bonafidely from the ostensible owner i.e. defendant No.2 after paying valuable consideration and as such the transfer is not voidable as per section 41 of the Transfer of Property Act, is concerned, from the judgments of both the courts below it is evident that the defendant No.1acknowledged the plaintiff to be the owner of the property in question as he was paying the rent of that portion to the plaintiff as tenant between 1982 and 1988 and therefore, the Courts below have rightly held that transaction between defendant No.2 and defendant

No.1 was not bona fide. Even otherwise, in the unregistered sale deed the property in question has not been described and therefore, no right accrued to the defendant No.1 so far as it relates to the portion of the property of the plaintiff. So far as other substantial question of law that the *patta* granted to the appellants by the Tehsildar is concerned, *patta* was admittedly granted in the year 2001 during the pendency of the suit on the basis of unregistered sale deed as has been found by both the Courts below and therefore, the argument of the counsel for the appellant that in the absence of the State as party, *patta* cannot be accepted.

10. In the light of aforesaid discussion, the concurrent findings of fact recorded by both the Courts below that the property of the plaintiff descried in schedule A was sold by defendant No.2 to defendant No.1 without his permission and the defendant No.1 took forcible possession of the property in August 1990 after execution of the deed and rented the same to defendant No.5, do not call for any interference in this appeal. Thus no substantial question of law as proposed by the counsel for the appellants arises for adjudication of this appeal and the appeal is therefore, liable to be dismissed and it is accordingly dismissed at the admission stage itself.

Sd/-
Dhirendra Mishra
Judge